No. 89-1008

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DWIGHT H. OWEN,
Petitioner

v.

HELEN OWEN,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

Whether, under Section 522 of the Bankruptcy Code—which authorizes the states to establish categories of exempt property for purposes of bankruptcy—a state may limit its homestead exemption so as to preserve a judicial lien.

Whether Section 522(f) of the Bankruptcy Code, which provides for avoidance of certain liens on exempt property, was intended to require retroactive application of a state exemption statute to invalidate a pre-existing judicial lien.

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STATEMENT OF FACTS

In the course of a personal bankruptcy case brought under chapter 7 of the Bankruptcy Code, petitioner sought a discharge of further liability for his outstanding debts and exemption of his residence from the claims of creditors.[1] At the time petitioner commenced his chapter 7 case, Florida, pursuant to section 522(b) of the Bankruptcy Code, had adopted a homestead exemption,[2]

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[1] Appendix to Petition for Certiorari (hereinafter "Pet. A.") at 3-4. Citations to "J.A." are to the Joint Appendix. Citations to "Br." are to the Petitioner's Brief.

[2] 11 U.S.C. § 522(b); Fla. Const. art. 10, § 4(a)(1), J.A. 13-14.

exempting petitioner's condominium from being included in the bankruptcy estate, but not exempting that property from a preexisting lien in favor of respondent, his former spouse. The issue is whether section 522(f) of the Bankruptcy Code, 11 U.S.C. § 522(f), requires the bankruptcy court to avoid this lien, a lien that existed before the homestead exemption became effective and that was specifically preserved by state law.

Necessary to an understanding of this issue is a description of applicable federal bankruptcy law, the exemption provided under Florida law, and the facts of this particular case.

A. The Federal Bankruptcy System

Under chapter 7 of the Federal Bankruptcy Code, an individual may commence a bankruptcy case and seek an orderly liquidation of his assets in payment of his liabilities. Congress has long been concerned that individuals have the opportunity to make a so-called "fresh start" after the bankruptcy proceedings have been concluded.[3] Accordingly, one consequence of the bankruptcy proceeding is that most of the debtor's debts are discharged, that is, the debtor is no longer personally liable.[4] Federal bankruptcy law also provides, and has provided since 1898,[5] that state law may create exemptions in individual bankruptcy for certain property so that it is excluded from the bankruptcy estate and is immune from creditors.[6] In effect, federal law provides that a debtor

[3] *See, e.g., Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

[4] In this chapter 7 case, the governing provision is section 727 of the Code, 11 U.S.C. § 727. Section 523, 11 U.S.C. § 523, provides exceptions to discharge, and section 524, 11 U.S.C. § 524, specifies the effects of discharge.

[5] Section 6, 30 Stat. 544, 548 (1898).

[6] 11 U.S.C. § 522(b)(1). Section 541 of the Bankruptcy Code, 11 U.S.C. § 541, provides that the commencement of a bankruptcy case creates an estate that broadly consists of all of the debtor's

"may exempt from property of the estate . . . any property that is exempt . . . under State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition . . . ."[7] As a consequence, exempt property is not sold (liquidated) in the course of the proceeding.

However, bankruptcy law has always shown a special solicitude for secured creditors. The mere fact that property is exempt from the bankruptcy estate does not avoid security interests in that property. And even though a debtor is discharged, the debtor's property may remain subject to a pre-existing security interest in favor of a creditor.[8] (A prime example would be a purchase money mortgage on a residence qualifying for a homestead exemption.)

Section 522(f) of the Bankruptcy Code defines the circumstances in which security interests in exempt property may be avoided (eliminated).

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property *to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b)* of this section [which specified the exemptions], if such lien is—
>
> (1) a judicial lien; or
>
> (2) a nonpossessory, nonpurchase-money security interest in [specified types of property].[9]

property. After the debtor has exempted property from the estate pursuant to section 522, property of the estate is distributed in a chapter 7 case pursuant to section 726 of the Code, 11 U.S.C. § 726.

[7] 11 U.S.C. § 522(b).

[8] *See Long v. Bullard*, 117 U.S. 617 (1886); 11 U.S.C. § 522(c) discussd below at pp. 19-22.

[9] 11 U.S.C. § 522(f) (emphasis supplied).

This case involves a judicial lien addressed by subsection (1).

B. The Background of this Case

In December 1975, respondent obtained a money judgment against the petitioner in Florida state court in the amount of $158,703.[10] A copy of the judgment was recorded in the public records of Sarasota County, Florida, on July 29, 1976.[11] The petitioner owned no property in Sarasota County at that time, but under Florida law the judgment would attach to any after-acquired property.[12]

On November 27, 1984, the petitioner acquired a condominium in Sarasota County.[13] At the time of the purchase, the condominium did not qualify for a homestead exemption from judgment liens under article 10, section 4 of the Florida Constitution, because the petitioner was a single man and the exemption was only available to the "head of a family." [14] However, on January 8, 1985,

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[10] Pet. A. 2, 15. The dollar amount appears in the Order cited in note 20 *infra*.

[11] *Id.*

[12] Pet. A. 2.

[13] Pet. A. 3, 15.

[14] Pet. A. 3, 15-16. In November 1984, article 10, section 4(a)(1) of the Florida Constitution had provided for a homestead exemption as follows:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by the head of a family:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family.

after the lien attached, an amendment to the Florida Constitution became effective extending the exemption to single individuals.[15] With certain exceptions not applicable here, the amendment provided that "no judgment . . . shall be a lien" on a homestead "owned by a natural person." [16] Respondent's lien remained effective both because (1) under Florida law, where a debtor qualifies for a homestead exemption only after a judgment lien has attached to his property, the property is not exempt from the lien,[17] and (2) respondent's lien attached to the petitioner's condominium before the effective date of the constitutional amendment, and the amendment did not apply retroactively to destroy the lien.[18]

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[15] The amendment was adopted before the lien attached but became effective only after it attached. Article 11, section 5(c) for the Florida Constitution provides:

> If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

Pet. A. 38. Thus the amendment became effective on January 8, 1985.

[16] Fla. Const. art. 10, § 4(a)(1), Pet. A. 36-37.

[17] *E.g., Lyon v. Arnold*, 46 F.2d 451, 452 (5th Cir. 1931) (construing Florida law); *Bessemer v. Gersten*, 381 So. 2d 1344, 1347 n.1 (Fla. 1980); *Aetna Insurance Co. v. LaGasse*, 223 So. 2d 727, 728 (Fla. 1969).

[18] *Pasco v. Harley*, 75 So. 30, 33 (Fla. 1917) ("homestead 'exemptions' do not exist as against a judgment obtained or conveyance made before the exemption was provided for by law"); *Matthews v. Jeacle*, 61 Fla. 686, 55 So. 865, 867 (1911) (Florida homestead exemption did not operate retroactively); *accord Keystone Water Co. v. Bevis*, 278 So. 2d 606, 608-09 (Fla. 1973) (a statute "is not to be given retrospective application unless it is required by the terms of the [s]tatute or it is unequivocally implied").

On January 13, 1986, petitioner commenced a chapter 7 bankruptcy case.[19] In schedules accompanying the petition, petitioner listed himself as owing debts which exceeded the total amount of his assets. Among the assets was petitioner's condominium, which he valued at $135,000. Among his liabilities were two debts totalling in excess of $346,000 owed to his former spouse, respondent in this case.[20]

Petitioner sought to discharge respondent's debts and at the same time to preserve his ownership in the condominium.[21] Accordingly, the petitioner claimed his condominium as exempt Florida homestead property pursuant to the newly adopted Florida constitutional provision.[22] There was no dispute that the debt would be discharged as a personal liability of the debtor. It was also clear that unsecured debts could not be enforced against the condominium, because the Florida exemption for single persons was effective at the time of the bankruptcy filing. In May 1986, the bankruptcy court granted petitioner a discharge.[23] Three months later, that court sustained the claimed exemption.[24]

After his discharge, the petitioner, apparently realizing for the first time that his condominium remained subject to respondent's lien, moved to reopen his chapter 7 case and to avoid respondent's judicial lien, pursuant to 11

[19] Pet. A. 16.

[20] *In re Owen*, Order on Objection to Claim of Exempt Property, United States Bankruptcy Court for the Middle District of Florida, Tampa Division, No. 86-106, at 2, Aug. 13, 1986; Schedule of Current Income and Current Expenditures, Jan. 13, 1986. These documents were part of the record in the bankruptcy court but were not included in the record on appeal. They have been lodged with the Clerk of this Court.

[21] Pet. A. 16-17.

[22] Pet. A. 16.

[23] J.A. 1; Pet. A. 17..

[24] J.A. 1-2.

U.S.C. § 522(f)(1), so that petitioner could retain the homestead property lien-free.[25] The bankruptcy court reopened the bankruptcy case but, in February 1988, denied the petitioner's motion to avoid respondent's judicial lien.[26] Finding that the judicial lien had attached before the petitioner's condominium qualified for the homestead exemption, the bankruptcy court concluded that the lien could not be avoided under section 522(f)(1) of the Bankruptcy Code.[27] The District Court for the Middle District of Florida affirmed, agreeing that the lien could not be avoided because it attached to petitioner's condominium before the property qualified for the exemption.[28] In affirming the district court, the Eleventh Circuit noted that petitioner

> argue[d] that federal law [gave] him an exemption that state law would not, even though the exemptions in Florida are defined by state law because of its 'opting out' of the federal exemption.

Congress did not intend through section 522(f), however, to provide a federal exemption greater

[25] J.A. 2.

[26] The bankruptcy court at first granted petitioner's motion to avoid the judicial lien. J.A. 3. After the respondent filed a timely motion to amend the initial order, the bankruptcy court reversed its initial ruling. J.A. 3-4.

[27] Pet. A. 26. The bankruptcy court stated, in pertinent part:

> Clearly, if at the time the certified copy of the Judgment was recorded in the Public Records, the Debtor owned the property but for whatever reason did not qualify to claim the property as homestead, such judgment lien would be clearly nonavoidable under § 522(f)(1) of the Bankruptcy Code. As the judgment lien in this case attached before the property qualified as homestead, the judgment lien is not of the type included within the ambit of § 522(f)(1) and may not be avoided.

Pet. A. 25-26.

[28] Pet. A. 22-23; 86 Bankr. 691, 694 (M.D. Fla. 1988).

than that protected by state law where the exemption is created by state law.[29]

The court concluded that

> [w]here, as here, the judgment attached prior to the homestead right, there is no impairment because the exemption is specifically subject to this exception.[30]

The court held that respondent's lien could not be avoided under section 522(f).

In view of a conflict in the circuits, this Court granted the petition for certiorari on May 14, 1990.

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[29] 877 F.2d at 47, Pet. A. 9-10.

[30] *Id.* Petitioner has pointed out that the Eleventh Circuit decision in this case appears to conflict with that circuit's decision in *In re Hall*. Br. at 30. In *In re Hall*, 752 F.2d 582 (11th Cir. 1985), a panel of the Eleventh Circuit found that the Georgia legislature had defined exemptions in a manner which precluded debtors from avoiding liens under section 522(f), and held that Georgia had no authority to do so. However, in *In re Bland*, 793 F.2d 1172, 1174 (11th Cir. 1986), the Eleventh Circuit sitting *en banc* found that "the *Hall* panel moved too quickly to the question of whether a state can opt out of section 522(f)" because the Georgia legislature had not intended to limit exempt property to unencumbered property. The court declined to decide whether a state can override section 522(f) by defining available exemptions to exclude encumbered property. *Id.* at 1175 n.5. While the Eleventh Circuit opinion in this case did not discuss either *Hall* or *Bland*, the court appeared to be rejecting the position it took in *Hall* when it concluded that Congress "did not intend through Section 522(f) . . . to provide a federal exemption greater than that protected by state law where the exemption is created by state law." 877 F.2d at 47. We note that, in a concurring opinion in *Bland*, Judge Hill concluded that "the only way to determine whether or not the debtor may avail himself of the lien avoidance provision is to consult state law. Federal law places no limits on the generosity or lack thereof with which states may define such exemptions." 793 F.2d at 1176 (concurring dubitante).

SUMMARY OF ARGUMENT

I. To assist individual debtors to make a "fresh start" after bankruptcy, section 522(b) of the Bankruptcy Code, 11 U.S.C. § 522(b), allows a debtor to "exempt from property of the estate . . . any property that is exempt . . . under State or local law that is applicable on the date of the filing of the petition at the place [of] the debtor's domicile . . . ." The effect of such an exemption is that the exempted property is not sold in the course of the bankruptcy proceeding to satisfy the claims of creditors.

In the 1978 Bankruptcy Code, Congress conferred on the states broad power to define bankruptcy exemptions pursuant to section 522(b). The State of Florida, while exempting homestead property from the claims of unsecured creditors, has limited that exemption to preserve liens, such as the one involved here, that predated the effective date of the state's homestead exemption. There is nothing in section 522(b) or its legislative history that suggests that Congress intended to deny states the power to so limit their exemptions. In fact, that legislative history shows that Congress consistently rejected proposals to limit state power to define exemptions—proposals to impose a uniform list of federal exemptions or to adopt an alternative list of federal exemptions that would have been available to debtors regardless of state law.

Petitioner's suggestion that section 522(f) of the Code, 11 U.S.C. § 522(f), was designed to limit state power is untenable. Section 522(f) was a new provision included in the 1978 Bankruptcy Code. It provides that certain liens on exempt property may be avoided (eliminated) if they impair an exemption "to which the debtor would have been entitled under" section 522(b). Here there is no exemption to which the debtor "would have been entitled" since the Florida exemption preserved the lien.

The legislative history of section 522(f) shows that it was not designed to limit state power to define exemptions but rather to make available exemptions effective. Before the enactment of section 522(b), this Court's decision in *Long v. Bullard*, 117 U.S. 617 (1886), had construed federal bankruptcy law to preserve liens in exempt property. Section 522(f) partially repealed the effect of this Court's decision in *Long v. Bullard* and thus eliminated this federal impediment to the effectuation of exemption policy. It was not designed to override the states' policy choices reflected in their exemption statutes.

II. Even if a state exemption provision could not limit the exemption to preserve liens on otherwise exempt property, section 522(f) should not be construed to require retroactive application of state exemption statutes to liens predating the creation of the state exemptions. This Court has long made clear that federal legislation, particularly in the bankruptcy area, should not be construed to operate retroactively absent a clearly manifested Congressional intent. This Court in *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), specifically held that section 522(f) should not be construed to avoid liens arising before its enactment in 1978. Similarly section 522(f) should not be construed as requiring the retroactive application of state law where, as here, the state has decided that its own exemption statute should not operate to avoid liens created before the effective date of the exemption. There is no federal policy that could possibly be served by compelling states to apply their exemption statutes retroactively, and there is no indication in the language of the Bankruptcy Code or its legislative history remotely suggesting any such purpose.

ARGUMENT

In urging this Court to reverse the decision below, petitioner argues that section 522(f)(1) of the Bankruptcy Code "must be applied independently of state law definitions of exemptions."[31] This argument is wrong for two separate reasons. First, as we discuss in Part I below, it ignores the language of section 522(f)(1), which permits a debtor to avoid a judicial lien only if the lien impairs an exemption "to which the debtor would have been entitled under" applicable law. The debtor here was entitled to an exemption under state law only to the extent of the property not subject to a lien, and accordingly the lien did not interfere with any exemption "to which the debtor would have been entitled." Second, as we discuss in Part II below, even if sections 522(b) and 522(f) of the Bankruptcy Code were read as denying Florida the power to limit the exemption to unencumbered property, those sections should not be construed to require retroactive application of state exemption statutes to invalidate pre-existing liens.

I. PETITIONER WAS NOT ENTITLED TO AN EXEMPTION, AND ACCORDINGLY CANNOT AVOID THE LIEN.

As petitioner appears to concede,[32] section 522(f) can be employed to avoid a judicial lien only in those situations where the lien "impairs an exemption to which the debtor would have been entitled under subsection (b)" of section 522.[33] Here it is clear that that condition is not satisfied because Florida law, and hence section 522(b), does not create an exemption for this property to the extent that it is subject to a pre-existing lien.[34] In de-

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[31] Br. at 19.

[32] Br. at 21, 23.

[33] 11 U.S.C. § 522(f).

[34] *See* p. 5 *supra*.

fining the scope of the exemption, Florida was doing what Congress contemplated it would do and empowered it to do.

A. Congress Conferred on the States Broad Power To Define Bankruptcy Exemptions.

In individual bankruptcy the Bankruptcy Code seeks to reconcile the claims of creditors with the so-called "fresh start" policy designed to assist the individual bankrupt's rehabilitation.[35] That reconciliation is generally reflected in two provisions of the Bankruptcy Code. The first of these—the provision for discharge—is governed entirely by federal law.[36] This provision generally provides that the individual debtor will receive a discharge in bankruptcy which will eliminate his personal liability for his debts.[37]

The second aspect of this reconciliation between creditor claims and the need for a "fresh start" is reflected in the Bankruptcy Code provisions concerning exemptions.[38] These exemptions exempt some limited portion of the debtor's property from the claims of creditors by permitting the debtor to exclude the exempt property from the bankruptcy estate and hence to prevent its liquidation and sale to satisfy the claims of creditors.[39] The states

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[35] *See* note 3 *supra*; *see generally* T. Jackson, *The Logic and Limits of Bankruptcy Law*, 225-52 (1986).

[36] *See* T. Jackson, *The Logic and Limits of Bankruptcy Law*, 254 (1986). *See also* 11 U.S.C. § 722 (redemption).

[37] *See* note 4 *supra*.

[38] *See* T. Jackson, *The Logic and Limits of Bankruptcy Law*, 254-59. *See also* 123 Cong. Rec. H35444, H35452 (daily ed. Oct. 27, 1977) (statements of Mr. Edwards and Mr. Drinan) (legislative history of the 1978 Bankruptcy Code recognizing the importance of exemptions to the "fresh start" policy).

[39] 11 U.S.C. § 522(b).

are specifically empowered by section 522(b) of the Code to define the scope of the exemptions.[40]

Section 522 was adopted as part of the Bankruptcy Reform Act of 1978[41] and was considered against the background of the former Bankruptcy Act, enacted in 1898.[42] The Bankruptcy Act of 1898 did not itself define the exemptions to which an individual would be entitled upon filing a bankruptcy petition. Rather Congress allowed the scope of a debtor's exemptions to be defined principally by reference to state law.[43] The exemptions many states provided were limited in scope and amount.[44] Limitations such as those involved here on a debtor's right to exempt property interests encumbered by judicial liens were not uncommon.[45] A number of state statutes

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[40] 11 U.S.C. § 522(b)(2)(A) ("an individual debtor may exempt from property of the estate . . . any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law . . .").

[41] 11 U.S.C. §§ 101 *et seq.*

[42] 30 Stat. 544 (1898).

[43] Section 6, 30 Stat. 544, 548 (1898). That Act, in section 6, permitted "bankrupts" to claim "the exemptions which are prescribed by the [non-bankruptcy] laws of the United States or by the State laws in force at the time of the filing of the petition. . . ." In earlier bankruptcy acts, federal law or a combination of federal and state law had governed exemptions. *See* 3 *Collier on Bankruptcy*, ¶ 522.01, at 522-8 to 522-9 (15th ed. 1989). Constitutional challenges to the adoption of state exemptions on the ground that this made federal bankruptcy law impermissibly non-uniform have been consistently rejected. *See, e.g., Hanover National Bank v. Moyses*, 186 U.S. 181 (1902).

[44] Professor Countryman described the limited scope of state exemption in *For a New Exemption Policy in Bankruptcy*, 14 Rutgers L. Rev. 678 (1960). *See also* Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 Iowa L. Rev. 445 (1960).

[45] Florida's rule preserving judicial liens which attached to property before the property qualified for an exemption long predated the Bankruptcy Code. *See Lyon v. Arnold*, 46 F.2d 451 (5th Cir.

modified the definition of exemption under state law to generally exclude property encumbered by valid liens. Some of these statutes substantially predated the Bankruptcy Code.[46] While there is no indication that, at the time that it considered the 1978 Code, Congress specifically focused on state statutes that defined exemptions to exclude lien-encumbered property, Congress was certainly aware of the discretion states had exercised in defining and limiting exemptions and that this had resulted in disparate results in different parts of the country.[47] Although some in Congress sought to change the bank-

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1931); *Lamb v. Ralston Purina Co.*, 21 So. 2d 127, 132 (Fla. 1945); *Pasco v. Harley*, 75 So. at 33. California law provided that a judgment lien prevailed if it attached to property before the debtor filed a homestead declaration as to the property. *See Esten v. Cheek*, 254 F.2d 667 (9th Cir. 1958); *Schuler-Knox Co. v. Smith*, 62 Cal. App. 2d 86, 144 P.2d 47, 53 (1944); *Carey v. Douthitt*, 140 Cal. App. 409, 35 P.2d 632 (1934). Independently, California courts construed that state's exemption provisions to operate prospectively only. *England v. Sanderson*, 236 F.2d 641, 642 & n.2 (9th Cir. 1956), *citing Application of Rauer's Collection Co.*, 87 Cal. App. 2d 248, 253, 196 P.2d 803, 807-08 (1948).

[46] *See* Haines, *Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State*, 1983 Ariz. L.J. 1, 26 n.153 *citing* Ariz. Rev. Stat. Ann. § 33-1122 (Supp. 1982-1983) (enacted 1976); Ark. Const. art. 9, § 3 (1947); Hawaii Rev. Stat. § 651-122 (Supp. 1982) (enacted 1976, amended 1978); N.M. Stat. Ann. § 42-10-6 (Supp. 1978) (enacted 1971).

[47] *See* H.R. Rep. No. 595, 95th Cong., 1st Sess., at 126 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6087 (criticizing "[m]ost" state exemption laws as "outmoded, designed for more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start for modern urban dwellers"); 124 Cong. Rec. S14721-22 (daily ed. Sept. 7, 1978) (remarks of Sen. Thurmond) (advocating "the approach of current law which adopts the exemption law of the State in which the debtor is located" as the "fairer way [which] allow[s] a fresh start, but on a limited basis").

ruptcy statute's dependence on state law for definition of exempt property, they ultimately failed to do so.

The Bankruptcy Commission Report, which formed the basis for the 1978 Bankruptcy Code, recommended that a system of federal exemptions be adopted, replacing entirely the state exemptions permitted by the Bankruptcy Act. The concern was that state exemptions had in some states been too generous and in others too restrictive and that overall uniformity was required for the federal bankruptcy system.[48] This approach of federalizing the exemptions did not win favor in the Senate or the House, but efforts to curtail the power of the states to define exemptions continued. The House sought to create greater uniformity nationwide by establishing a federal list of exemptions contained in the Bankruptcy Code and giving the debtor the option of selecting either the Code's list of exemptions or exemptions in the debtor's state of domicile.[49] The Senate rejected this proposal. Seeking to

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[48] Report of the Commission on the Bankruptcy Laws of the United States ("Commission Report"), H.R. Doc. No. 137, 93d Cong., 1st Sess., Pts. I and II, at 170-71 (1973). *See also Bankruptcy Reform Act of 1978: Hearings on S.235 and S.236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., at 36 (1975) (statement of Harold Marsh, Jr., Chairman of Comm'n on Bankruptcy Laws of the United States) ("in same [sic] States the level of exemption is highly unreasonable in both directions").

[49] Section 522(b) of the House bill, H.R. 8200, provided in pertinent part:

> (b) Notwithstanding section 541 of this title, an individual may exempt from property of the estate *either*—
>
> (1) property that is specified under subsection (d) of this section; or, *in the alternative*,
>
> (2)(A) any property that is exempt under Federal, State, or local law, other than subsection (d) of this section . . . .

(emphasis supplied).

The so-called judges' bill, which was also important in shaping Congressional thinking, included a similar proposal that would

preserve the discretion of the states to prescribe exemptions, the Senate passed a bill which did not contain a list of federal bankruptcy exemptions, but rather provided that an individual could exempt from property of the estate "any property that is exempt under Federal [non-bankruptcy], State, or local law . . . ." [50] The Senate and House reached a compromise by enacting, in section 522(d) of the Code, a list of federal exemptions and, at the same time, allowing the states, by legislation, to preclude debtors from choosing the new federal exemptions as an alternative to state exemptions in bankruptcy

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have given "the debtor an option to choose State law exemptions or the federal laws but put a maximum of $25,000 on the exemptions that can be claimed under the Federal bankruptcy laws." *Bankruptcy Reform Act of 1978: Hearings on S.235 and S.236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., at 25 (1975) (statement of Frank Kennedy, Executive Director of Comm'n on Bankruptcy Laws of the United States).

[50] Section 522(b) of the initial Senate bill, S. 2266, was substantially the same as the exemption provision under the former Bankruptcy Act. S. Rep. No. 989, 95th Cong., 2d Sess., at 75 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5861. The Report of the Senate Judiciary Committee on S. 2266 listed some of the items that may be exempted under federal laws other than the Bankruptcy Code:

> Foreign Service Retirement and Disability payments, 22 U.S.C. 1104; Social security payments, 42 U.S.C. 407; Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717; Wages of fishermen, seamen, and apprentices, 46 U.S.C. 601; Civil service retirement benefits, 5 U.S.C. 729, 2265; Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. 916; Railroad Retirement Act annuities and pensions, 45 U.S.C. 228(L); Veterans benefits, 45 U.S.C. 352(E); Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. 3101; and Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. 175.

Id.

cases.[51] To satisfy the Senate, this compromise imposed no limits on the states' discretion to define their exemptions.

As a result of this legislative compromise, section 522(b) of the Code provides that an individual debtor may exempt either property listed in section 522(d) of the Code or "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law . . . ." The Code also permits states to "opt out" of section 522(d) and thereby preclude debtors from choosing the list of federal exemptions appearing in that section.[52] Florida became one of the states banning debtor election of the federal list of exemptions.[53]

The legislative history of section 522(b) confirms Congress' intent to give states broad discretion to define exemptions. The Report of the Senate Judiciary Committee accompanying the Senate's bill, S. 2266, mentioned no limits on the discretion of states in defining exemptions. The Report in fact indicated that the exemption provision of the bill, section 522(b), "track[ed] current

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[51] 124 Cong. Rec. H11095 (daily ed. Sept. 28, 1978) (joint explanatory statement of the House and Senate floor managers explaining compromises that were reached) ("Section 522 of the House amendment represents a compromise on the issue of exemptions between the position taken in the House bill, and that taken in the Senate amendment. Dollar amounts specified in section 522(d) of the House bill have been reduced from amounts as contained in H.R. 8200 as passed by the House. The States may, by passing a law, determine whether the Federal exemptions will apply as an alternative to State exemptions in bankruptcy cases").

[52] 11 U.S.C. § 522(b)(1) ("an individual debtor may exempt from property of the estate . . . property that is specified under subsection (d) of this section, *unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize* . . .") (emphasis added).

[53] Chapter 222.20, Florida Statutes, J.A. 16. Thirty-five states have enacted legislation prohibiting citizens from electing the federal exemptions contained in 11 U.S.C. § 522(d). 3 *Collier on Bankruptcy*, ¶ 522.02, at 522-11 n.4 (15th ed. 1989) (listing states). Of course, even where a state has opted-out, federal non-bankruptcy exemptions remain available. 11 U.S.C. § 522(b)(2)(A).

law." [54] Even the House Report, in urging the approach ultimately rejected by the Conference Committee, recognized that "the circumstances do vary in different parts of the country" and continued to permit states "to set exemption levels appropriate to the locale" under the optional provision.[55] The legislative history accompanying the House-Senate compromise on section 522(b) contains no suggestion that Congress intended to limit the discretion of States in defining exemptions.[56]

B. Section 522(f) Was Designed To Protect State and Federal Policy Choices Reflected in the Exemption Provisions, Not To Supercede Those Choices.

At the same time that Congress in section 522(b) authorized the states to create exemptions and created an alternative list of federal exemptions, Congress in other portions of section 522 sought to protect the policy choices reflected in the state or federal exemptions. Such action was necessary because the creation of exemptions, in and of itself, would not protect the property from certain types of claims. Thus Congress provided in:

—subsection (c), that the exempt property was not liable "during or after the case" for pre-existing debts with the exception of certain non-dischargeable debts (generally taxes, alimony, and child-support payments) and non-avoidable liens;

—subsection (e), that waivers of exemptions in favor of unsecured creditors would be ineffective;

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[54] S. Rep. No. 989, 95th Cong., 2d Sess., at 75 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5861. *See also* 124 Cong. Rec. S14719 (daily ed. Sept. 7, 1978) (remarks of Sen. Wallop) ("the current law allowing States to determine the property exemptions that debtors will have for their fresh start after bankruptcy will be retained").

[55] H.R. Rep. No. 595, 95th Cong., 1st Sess., at 126 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6087.

[56] *See* 124 Cong. Rec. H11095 (daily ed. Sept. 28, 1978).

—subsection (f), that "[n]otwithstanding any waiver of exemptions," certain liens in exempt property would be avoided "to the extent that such lien[s] impair[] an exemption to which the debtor would have been entitled under subsection (b) . . .";

—subsections (g), (h), and (i), that the debtor could exempt certain property recovered by the trustee (or the debtor himself) under the so-called avoiding powers; [57] and

—subsection (k), that the exempt property would be liable for administrative expenses of the bankruptcy case only to a limited extent.[58]

The need for a provision such as section 522(f) was particularly important in light of this Court's 1886 decision in *Long v. Bullard*, 117 U.S. 617 (1886). In that case, Long and his wife had mortgaged exempt homestead property to Bullard. After Long had received a discharge in bankruptcy, Bullard brought an action seeking to compel a judicial sale of the exempt property to pay off the debt. In rejecting the Longs' claim that the mortgage was no longer effective, this Court stated:

> [Bullard's] security was preserved notwithstanding the bankruptcy of his debtor . . . .
>
> The setting apart of the homestead to the bankrupt under § 5045 of the Revised Statutes [providing for exemptions] did not relieve the property from the operation of liens created by contract before the bankruptcy.[59]

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[57] Under the Bankruptcy Code, the trustee is able to avoid preferential, fraudulent, and certain other transfers. *E.g.*, 11 U.S.C. §§ 544, 547, 548, 549, and 550. *See generally* 4 *Collier on Bankruptcy*, Chapters 544, 547, 548, 550 (15th ed. 1989).

[58] *See* 11 U.S.C. § 522(c), (e)-(i), (k).

[59] 117 U.S. at 620-21.

This Court thus held that neither the debtor's discharge nor state exemption of the debtor's property protects that property from holders of secured interests.

Congress in the 1898 Act did not alter that rule. The situation prevailing under the 1898 Act was described by Justice Brandeis in *Louisville Bank v. Radford*, 295 U.S. 555 (1935), as follows:

> Some States had granted to debtors extensive exemptions of unencumbered property from liability to seizure in satisfaction of debts; and these exemptions were recognized by the bankruptcy act of 1867, as well as that of 1898. But unless the mortgagee released his security, in order to prove in bankruptcy for the full amount of the debt, *a mortgage even of exempt property was not disturbed by bankruptcy proceedings.*[60]

Thus, the 1898 Act looked to state law for the definition of exemptions, but federal law preserved security interests in exempt property pursuant to this Court's decision in *Long v. Bullard.*

The drafters of the 1978 Code sought to change this federal lien preservation policy in some respects and thus to afford greater protection for the exemptions defined by state or federal law. This goal was accomplished by providing:

—in section 522(c), that "property exempted . . . is not liable during or after the case for any debt . . . that arose . . . before the commencement of the case, except . . . (2) a debt secured by a lien that is [not avoided];" and

—in section 522(f), that certain liens that might exist in the exempt property would be avoided.

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[60] *Id.* at 582-83, *citing Long v. Bullard*, 117 U.S. 617 (emphasis supplied).

This lien avoidance extended only to two specified types of liens—so-called judicial liens and non-possessory, nonpurchase money liens.[61] Even the latter types of liens were to be avoided only in specified property.

The reasons for adopting these lien avoidance provisions was described most explicitly in the House Report.

> [*T*]*he bill gives the debtor certain rights not available under current law with respect to exempt property.* The debtor may void any judicial lien on exempt property, and any nonpurchase money security interest in certain exempt property such as household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy . . . . The [second] exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods.[62]

Both the Senate and the House Reports made clear, however, that the "rule of *Long v. Bullard*, 117 U.S. 617 (1886), is accepted with respect to the enforcement of *valid* liens . . . on exempt property."[63] The effect, there-

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[61] Thus, for example, purchase money liens may not be avoided under section 522(f). *See In re Hall*, 752 F.2d at 586 n.5. Other types of liens are, of course, avoided by other sections of the Code but for different reasons.

[62] H.R. Rep. No. 595, 95th Cong., 1st Sess., at 126-27 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6087-88 (footnotes omitted and emphasis supplied). As to the first right, the House Committee believed that the exemption should be preserved even if "a creditor beats the debtor into court" and as to the second it concluded that "over-reaching creditors" should not have an "unfair advantage." *Id.*

[63] H.R. Rep. No. 595, 95th Cong., 1st Sess., at 361 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6317; S. Rep. No. 989, 95th Cong., 2nd Sess., at 76 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5862 (emphasis sup-

fore, of sections 522(c) and (f) was to continue to preserve, as a matter of federal policy, purchase money and certain other types of liens on exempt property, but to reduce the federal role by allowing state and federal exemptions to eliminate the liens specified in section 522(f).[64]

C. Section 522(f) Was Not Designed To Avoid Liens Preserved by State Law.

While not disputing that section 522(b) makes the exemption in this case entirely dependent on state law,[65] petitioner urges that the policy of section 522(f) would somehow be frustrated if the states were permitted under section 522(b) to define their exemptions to preserve state-created liens, stating

> It is not reasonable to conclude that Congress provided lien avoidance remedies which affected, primarily, encumbrances arising by virtue of state law and, at the same time, "impliedly" relinquished to the states the power to evade that federal remedy through the means of exemption 'exceptions.'[66]

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plied). *See also* 3 *Collier on Bankruptcy*, ¶ 522.04, at 522-17 (15th ed. 1989) ("the discharge will not prevent the enforcement of valid liens—even on exempt property").

[64] For example, the Bankruptcy Commission bill described its equivalent of section 522(f) as "avoid[ing] one of the means by which the policy of § 6 of the Act [adopting state exemptions] was frustrated." *Commission Report* at 130. *See also Bankruptcy Reform Act of 1978: Hearings on H.R. 31 and 32 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 94th Cong., 2d Sess., at 979 (1976) (statement of Bernard Shapiro, National Bankruptcy Conference) (exemptions "are also valueless if a creditor has a security interest in exempt property").

[65] *See* Br. at 30.

[66] Br. at 33. As noted below, some courts of appeals have agreed. *In re Snow*, 899 F.2d 337 (4th Cir. 1990) (holding that lien for rent may be avoided under section 522(f) even though Virginia statute excepted liens for rent from homestead exemption); *In re Leonard*, 866 F.2d 335, 336 (10th Cir. 1989) (avoiding lien on household goods, even though Colorado provision limited exemption for household goods to the extent of $1,500 in "value" and defined "value" as the difference between the fair market value and the amount of the lien).

This argument is not sustainable:[67]

First, it appears that the entire purpose of section 522(f), in conjunction with 522(c), was to partially overrule this Court's decision in *Long v. Bullard*. *Long v. Bullard* represented a federal impediment to the effectuation of state exemption policy. Congress' desire to partially overrule that decision and thus to limit the federal role in the exemption process hardly suggests that Congress intended to take the additional step of refusing to permit the states to exercise their traditional power of defining the scope of their exemptions.[68]

Second, it is quite clear that Congress did not intend to restrict state power. Section 522(b) on its face does

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[67] In addition to the present case, the issue has come up primarily in cases under section 522(f)(2) involving liens on household goods, *e.g.*, *In re Pine*, 717 F.2d 281, 283 (6th Cir. 1983) (analyzing Georgia and Tennessee statutes which exempted respectively, the "debtor's interest" and the "debtor's equity interest" in certain household goods and thus, according to the court, limited the debtor's exempt property to the "interest in property which is owned by [the debtor] and unencumbered by third party liens"), *cert. denied*, 466 U.S. 928 (1984); *In re Leonard*, 866 F.2d at 336 (Colorado created exemption for household goods to the extent of $1,500 in value; "value" defined as the difference between the fair market value and the amount of the lien); *In re McManus*, 681 F.2d 353, 356 (5th Cir. 1982) (Louisiana R.S. 13:3885, which provided that household goods subject to a chattel mortgage were not exempt). One case decided under section 522(f)(1) involved a Virginia provision which preserved judicial liens "[f]or rent." *In re Snow*, 899 F.2d at 339.

[68] It is significant that not one of the court of appeals' decisions finding that section 522(f) overrode state exemption policy discussed either this Court's decision in *Long v. Bullard* or the fact that section 522(f) was designed to partially overrule that decision to make the exemptions effective.

not limit the states' discretion to define exemptions.[69] Rather section 522(b) allows a debtor to exempt from property of the estate "any property that is exempt under State or local law." Section 522(b) does not require the states to exempt any particular kinds of property. Congress and the courts have repeatedly recognized the power of the states to fashion their exemptions as they choose. Thus it is clear that the states may place a dollar limit on particular exemptions;[70] may deny the exemptions to the debtor who engages in fraudulent conduct;[71] and may refuse to adopt any exemption for a particular kind of property.[72] Thus, a state seeking to preserve judi-

[69] Petitioner argues that "the phrase, '. . . would have been entitled under sub-section (b) . . .' [appearing in section 522(f)] supports the contention that (f) was meant to apply in situations where enjoyment or assertion of an exemption was prevented by an encumbrance of the type described in (f)(1) and (f)(2)." Br. at 24-25. The use of the word "would" rather than "is" in section 522(f) hardly suggests that Congress intended to override state policy defining exempt property. The use of the word "would" reflected the fact that exempt property that is encumbered by a lien would remain encumbered under the rule of *Long v. Bullard* absent avoidance of the lien. Section 522(f) thus permits avoidance of a lien "to the extent that such lien impairs any exemption to which the debtor would have been entitled under subsection (b)." 11 U.S.C. § 522(f). It does not, however, permit avoidance of a lien where the lien impairs no exemption to which the debtor "would" have been entitled under state law.

[70] Addressing these dollar value limits, the House and Senate committee reports indicate that one important purpose of section 522(f) was to avoid a judicial lien "to the extent that the property could have been exempted in the absence of the lien." H.R. Rep. No. 595, 95th Cong., 1st Sess., at 362 (1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6318; S. Rep. No. 989, 95th Cong., 2d Sess., at 76 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5862.

[71] *See* 3 *Collier on Bankruptcy*, ¶ 522.08 (15th ed. 1989).

[72] The earlier decision of the Eleventh Circuit in *In re Hall*, while rejecting the suggested construction of 522(f), noted that "[i]n granting the states the power to opt out of the federal list

cial liens against homestead property could do so without offending the Bankruptcy Code by providing no exemption for such property.

Petitioner cites no legislative history suggesting that section 522(f) had any purpose to limit state power to define exemptions.[73] In view of the states' virtually unlimited power to define exemptions where liens are not implicated, it is difficult to see what federal policy would be undermined if the state statute is permitted to limit the exemption to property not subject to liens. Dean Thomas Jackson, a leading expert in the field of bankruptcy law, has agreed: "In a regime where nonbankruptcy law determines what is exempt and when the special categories are nonconsensual instead of consensual, there is little reason for bankruptcy law to override that state balance."[74] It is particularly difficult to believe that the federal government would have the slightest interest in defeating such a limitation on the state homestead exemption in view of the narrow scope of the alternative federal homestead exemption[75] and the fact

of exemptions, Congress did not appear to place any limit on the states' ability to do so." 752 F.2d at 587 (footnote omitted). *See also In re Bland*, 793 F.2d at 1176 (Hill, J., concurring dubitante) ("Georgia could, if it wished, provide for no exemption at all on personal, family and household goods. That would not override the provisions of section 522(f).").

[73] An earlier decision of the Eleventh Circuit purportedly found significance in the presence of a lien avoidance provision in the Senate bill at a time when that same bill provided only for state (and federal non-bankruptcy) exemptions. *In re Hall*, 752 F.2d at 587. The theory there apparently was that section 522(f) must have been designed to negate a state decision to exclude the lien from the exemption since no federal bankruptcy exemptions were included in the Senate version of the bill. As noted below, pp. 26-27, section 522(f) serves important purposes quite apart from the federal exemption provisions contained in section 522(d).

[74] T. Jackson, *The Logic and Limits of Bankruptcy Law*, 266.

[75] Section 522(d)(1) provides a homestead exemption "not to exceed $7,500 in value." The initial House bill, H.R. 8200, pro-

that Section 522(f)(2), dealing with non-possessory non-purchase money liens, does not even apply to avoid liens on residences.

Finally, contrary to petitioner's view[76] and the suggestion of the Tenth Circuit,[77] section 522(f) would not be rendered meaningless if it were construed to give deference to the state definition of the scope of the exemptions. As we have discussed, in view of this Court's decision in *Long v. Bullard*, section 522(f) was essential to ensure that state policy reflected in the exemption statute would be effectuated by the avoidance of liens. The domiciliary state law in and of itself would often not provide a mechanism for avoiding such liens. For example, many state exemption statutes provide only that the property will be exempt in bankruptcy cases and do not prevent the fixing of liens in such property in the first instance.[78] Avoidance of liens created in a non-

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vided a homestead exemption not to exceed $10,000 in value, while, as described above, the initial Senate bill, S. 2266, provided no federal homestead exemption. As part of the compromise, the dollar amount in section 522(d)(1) was lowered.

[76] Br. at 31.

[77] *See In re Leonard*, 866 F.2d at 337 ("[a]ny other reading of § 522(f) would make the language meaningless and would lead to an absurd result").

The earlier Eleventh Circuit decision in *In re Hall* also stated that that failure to invalidate state liens "would render the statute useless, a result inconsistent with the well-established principle of statutory construction requiring that all parts of an act be given effect, if at all possible." 752 F.2d at 586.

[78] *E.g.*, Ark. Code Ann. § 16-66-218(a) (Supp. 1987) ("[t]he following property shall be exempt from execution under bankruptcy proceedings . . ."); Ga. Code Ann. § 44-13-100 (Supp. 1988) ("any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property . . ."); Ky. Rev. Stat. Ann. § 427.160 (Michie Supp. 1989) ("[i]n addition to other exemptions provided in this chapter every debtor shall have a general exemption not to exceed one thousand dollars ($1,000) in value to be applied toward any property, real or personal, tangible or intangible in his estate when he has filed for

domiciliary state was also essential if the domiciliary state's choice was to be preserved.[79] Moreover, as many commentators have pointed out, a primary purpose of 522(f) appears to be to preserve the federal bankruptcy exemptions appearing in section 522(d) of the Bankruptcy Code.[80] Indeed, section 522(f) seems to a significant extent to be specifically designed to preserve certain of the federal exemptions.[81] Section 522 is also necessary to avoid liens impairing exemptions created by federal non-bankruptcy law.[82]

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bankruptcy under the provisions of the Bankruptcy Code of 1978 . . ."). In some cases, of course, a judicial lien would not exist in the state creating the exemption since the exemption would itself bar the fixing of a judicial lien. *E.g.*, Tex. Const. art. 16, § 50 ("[n]o mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon . . .").

[79] *See* 3 *Collier on Bankruptcy*, ¶ 522.06, at 522-28 (15th ed. 1989).

[80] *See, e.g.*, T. Jackson, *The Logic and Limits of Bankruptcy Law*, 264 ("In part, this section is necessary because of the bankruptcy exemptions of section 522(d). These kinds of property are protected by bankruptcy law itself and may have picked up liens or security interests outside of bankruptcy, where they may not have been considered exempt."); R. Jordan & W. Warren, *Bankruptcy*, 67 (2d ed. 1989) ("[s]ince § 522(d) provides a federal schedule of exemptions, the lien may relate to property that the debtor can exempt in bankruptcy even though that property may have been nonexempt under the state law"); 1 W. Norton, *Norton Bankruptcy Law and Practice* § 26.41 (1981) (section 522(f)(1) "has particular application to permitting avoidance of judicial liens on property that is exempt under the federal alternative exemption scheme though not exempt under state law") (footnote omitted).

[81] This design is suggested by the "similarity in phrasing between the items protected by § 522(f)(2) and the items listed in § 522(d)(3), (4), (6) and (9)." *See* T. Eisenberg, *Bankruptcy and Debtor-Creditor Law*, 493 (2d ed. 1988).

[82] *See* note 50 *supra* for a partial list of such exemptions. Under section 522(b), states which have opted out of section 522(d) and thereby precluded debtors from claiming exemptions listed in that

In short, the primary purpose of section 522(f) was to reduce the role of federal bankruptcy law in preserving security interests and thus to prevent "impair-[ment]" of the exemptions created by state or federal law. Its purpose was not to expand the scope of state exemptions by avoiding liens that the states acted to preserve. The courts of appeals in this case and in the Fifth and Sixth Circuits have correctly held that states can preclude the avoidance of liens under section 522(f) by defining encumbered property to be non-exempt to the extent of the encumbrance.[83]

II. CONGRESS DID NOT INTEND TO PRECLUDE THE STATES FROM ENACTING EXEMPTION PROVISIONS WHICH OPERATE PROSPECTIVELY ONLY.

Even if section 522(f) were to be construed generally to override state laws defining the scope of the exemptions to exclude encumbered property, that section would not permit avoidance of the lien in this case because that lien arose before the exemption became effective. There is not the slightest indication that Congress intended to require retroactive application of a state exemption provision, such as the Florida provision, where under state law the provision operates prospectively only.

Article 10, section 4(a)(1) of the Florida Constitution by its terms precludes the attachment of new judicial liens to exempt homestead property, and the courts of that state have held that liens based on judgments filed

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section cannot prevent debtors from claiming exemptions available under federal laws other than the Bankruptcy Code. That is because a debtor may still exempt "any property that is exempt under Federal law, other than subsection (d) of this section" in addition to property that is exempt under "State or local law." 11 U.S.C. § 522(b)(2)(A).

[83] *In re Pine*, 717 F.2d at 283-284; *In re McManus*, 681 F.2d 353 (5th Cir. 1982).

after the property qualified for the exemption do not attach to the exempt property.[84] When Florida amended the constitution to extend the homestead exemption to all "natural person[s]," however, it acted prospectively.[85] Thus, a judicial lien on property which otherwise qualifies for the homestead exemption remains enforceable under Florida law where, as here, it attached before the effective date of the amendment.[86]

This Court has long recognized the presumption that legislation is to be applied only prospectively unless Congress specifies otherwise.[87] As the Court noted in *Bowen v. Georgetown University Hospital*, "congressional enactments and administrative rules will not be construed to

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[84] *See Aetna Insurance Co. v. LaGasse*, 223 So. 2d at 729 (priority given to homestead right if homestead right and lien attach simultaneously); *Bowers v. Mozingo*, 399 So. 2d 492, 494 (Fla. App. 1981) (same); *Volpitta v. Fields*, 369 So. 2d 367, 369 (Fla. App.) ("no judgment can be a lien upon homestead property if the property acquired homestead exempted status prior to the existence of the judgment lien"), *cert. denied*, 379 So. 2d 204 (Fla. 1979); *Clements v. Henderson*, 70 Fla. 260, 70 So. 439 (1915) (per curiam) (permitting a homesteader to quiet title as against judgment lien).

[85] *See* cases cited at note 18 *supra*.

[86] *See* note 18 *supra*.

[87] *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982) ("[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"); *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935) ("a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears"); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928); *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) ("[w]ords in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied").

have retroactive effect unless their language requires this result." [88] The rule has been repeatedly recognized in the bankruptcy context.[89] This Court has specifically held that this principle of construction applies to section 522(f) of the Bankruptcy Code. In *United States v. Security Industrial Bank*, the Court held that section 522(f), in a case involving the federal bankruptcy exemptions in section 522(d), should not be applied to liens arising before its date of enactment because:

> [n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress.[90]

While the present retroactivity issue arises in a slightly different context, the retroactivity question presented

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[88] 488 U.S. 204, 207 (1988). In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, this Court noted, but did not reconcile, the "apparent tension" between that rule and two recent cases saying that a "statute that went into effect during the pendency of [an] appeal was to be applied by the appellate court," 110 S. Ct. 1570, 1576, 1577 (1990) (referring to *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974) and *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 282 (1969)). The Court need not resolve this tension here, because the presumption applied in *Bradley* and *Thorpe* has been limited to "cases in which the statute has been enacted after initial adjudication," *Kaiser*, 110 S. Ct. at 1586 (Scalia, J., concurring) and is subject to an "exception" where retroactive application " 'would infringe upon or deprive a person of a right that had matured or became unconditional,' " *id.* at 1585 (Scalia, J., concurring), *quoting Bradley*, 416 U.S. at 720. In this case, the Florida amendment became effective long before the commencement of this case or any appeal, and this is also a case where retroactive application would destroy respondent's lien "that had matured" before the Florida amendment became effective.

[89] *Holt v. Henley*, 232 U.S. 637, 639 (1914) ("the reasonable and usual interpretation of [bankruptcy] statutes is to confine their effect, so far as may be, to property rights established after they were passed").

[90] 459 U.S. at 81-82.

here is in principle the same as that involved in *Security Industrial Bank*, for it is not state law here that creates the retroactivity problem, but federal law. Just as section 522(f) was construed in *Security Industrial Bank* not to have retroactive application, so here it should not be construed as requiring that state policy be retroactively applied. *Kener v. La Grange Mills*, 231 U.S. 215 (1913).[91] In view of the well-established federal policy against retroactive lien avoidance, it would be odd indeed to find that Congress intended the federal Bankruptcy Code to require that state exemption statutes be given retroactive effect, particularly when the state itself deliberately chose to make the exemption provisions prospective only.

Neither the Bankruptcy Code nor its legislative history manifests a Congressional purpose to require that state exemption provisions be given retroactive effect. Even far more specific language has been found insufficient to mandate retroactive operation of state exemption law.[92] Just as in *Security Industrial Bank*, where section 522(f) was construed not to operate retroactively, section 522's silence cannot constitute the "clear, strong and im-

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[91] In *Kener*, this Court held that federal bankruptcy law cannot constitutionally require retroactive application of state exemptions to invalidate pre-existing liens. The Court's decision rested independently on principles of statutory construction. *Id.* at 218. Here, as in *Security Industrial Bank*, the existence of constitutional doubts supports a limiting construction.

[92] The Bankruptcy Act of 1867 provided for certain uniform federal exemptions, plus exemptions as were available under other federal laws and the laws of the debtor's domicile in force in 1864. 14 Stat. 523 (1867). In 1872, Congress amended the statute to permit debtors to claim exemptions available under state exemption laws in force in 1871. 17 Stat. 334, chap. 339 (1872). After at least one court held that Congress had not intended to incorporate state exemption laws to the extent those laws operated retrospectively to impair prior debts, *In re Wyllie*, 30 Fed. Cas. 733 (No. 18,112) (W.D. Va. 1872), Congress stated in an 1873 amendment that state exemption provisions were to operate retroactively. The

perative" expression of intent necessary to require state exemption provisions such as Florida's to operate retroactively.[93]

1873 Amendment provided that "it was the true intent and meaning" of the 1872 amendment:

> that the exemptions allowed the bankrupt by the amendatory act should, and it is hereby enacted that they shall, be the amount allowed by the constitution and laws of each State [in force in 1871] and that such exemptions be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree, of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding.

17 Stat. 577, chap. 235 (1873). As noted above, note 91 *supra*, this Court refused to give effect even to the 1873 amendment in *Kener v. La Grange Mills*, 231 U.S. 215 (1913).

[93] *United States v. Heth*, 7 U.S. (3 Cranch) at 413. We recognize that this Court in *Security Industrial Bank* did not resolve the question of whether section 522(f) could be applied to avoid liens created during the "gap period" between enactment of the statute and its effective date, 459 U.S. at 82 n.11; that at least one court of appeals after *Security Industrial Bank* has held that section 522(f) avoids liens arising during the gap period, *In re Ashe*, 712 F.2d 864 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984); *Cf. In re Webber*, 674 F.2d 796 (9th Cir.), *cert. denied*, 459 U.S. 1086 (1982) (decided before *Security Industrial Bank*; and that the lien in question here arose between the enactment and effective date of the Florida constitutional provision. However, we suggest that *In re Ashe* was incorrectly decided. The entire purpose of having a separate effective date is to avoid application of the statute upon its enactment date. *See United States v. Estate of Donnelly*, 397 U.S. 286, 294 (1970) ("[a]cts of Congress are generally to be applied uniformly throughout the country *from the date of their effectiveness onward*") (emphasis supplied); *Kaiser*, 110 S. Ct. at 1578 (amendment to federal postjudgment interest statute, 28 U.S.C. § 1961, did not govern interest rate on judgment predating amendment's effective date; "Congress delayed the effective date on the amended version cannot be applied before the effective date of 1982"). prepare for the change in the law. . . . Thus, at the very least, the amended version cannot be applied before the effective dat of 1982"). In any event, the theory of *In re Ashe* has no application here. First, in concluding that section 522(f) could be applied during the gap period between the passage and effective date of the Code, *Ashe* rested on Congressional intent. *In re Ashe*, 712 F.2d at 868. By contrast, there is no reason to believe that Congress intended to override a state exemption provision to the extent it did not apply retroactively. *Kener v. La Grange Mills*, 231 U.S. 215 (1913). The decision in *Ashe* also rested on the fact that notice existed of the effect of the Code upon its enactment. *In re Ashe*, 712 F.2d at 868 (creditors acquiring liens during the gap period had notice of the future effect of the Code). Whether or not Congress provided effective warning of the possibility of lien avoidance in connection with the alternative list of federal exemptions, no such notice existed here. Florida advised potential security holders that liens arising before the effective date of the new constitutional provision would be preserved.

Because there is no indication in either the language of section 522 or the legislative history that Congress intended to require retroactive operation of state exemption provisions, section 522(f) should not be construed to override Florida's decision to have the exemption operate prospectively only, and respondent's lien should be preserved.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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